

**STATE OF MICHIGAN
IN THE SUPREME COURT**

11

DEC

2002

**ON APPEAL FROM THE COURT OF APPEALS
Saad, PJ., Owens and Cooper, JJ.**

**PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,**

**vs
MICHAEL BRANDON SCHERF
Defendant-Appellee**

No. 121698

**Lower Court No:00-000337-ar
COA NO.234661**

**BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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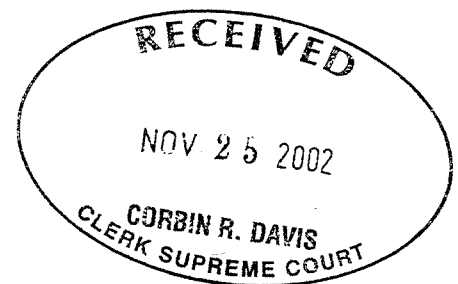


Table of Contents

	<u>Page</u>
Index of Authorities.	-iii-
Summary of Argument	-vii-
Statement of the Question	-1-
Statement of Facts	-1-
Argument	-2-
I. The exclusionary rule is a judicially created sanction for police misconduct that violates the constitution, designed to deter not to repair. The purpose of the exclusionary rule is not advanced when there is no misconduct by the police. Exclusion of the truth in a criminal proceeding in the absence of some incontestable compensating gain is an affront to justice and inflicts gratuitous harm on the public.	-2-
A. Introduction	-2-
B. The Exclusionary Rule: Its Purpose and Limits	-3-
(1) Purpose	-3-
(2) Limitations on the exclusionary rule	-8-
(a) Standing	-9-
(b) Fruit of the Poisonous Tree and Purged Taint	-10-
(c) Inevitable Discovery	-11-
(d) Independent Source	-13-
(e) Noncriminal Proceedings	-15-
(3) Conclusion	-15-
C. The Good -Faith Exception to Exclusion	-16-
(1) Some Salient United States Supreme Court Cases	-16-
(2) Michigan Cases	-21-
(3) The Michigan Constitution affords no basis to reject the good-faith exception	-23-

People v Champion, 452 Mich. 492 (1996)	26
--	----

Sitz v Department of State Police, 443 Mich. 774 (1993)	23
--	----

OTHER

Entick v Carrington, 19 Howell's State Trials 1029 (1765)	3
--	---

Wilkes v Wood, 19 Howell's State Trials 1153 (1763)	3
--	---

4 Wigmore, <i>Evidence</i> (2d Ed: 1923)	5
--	---

Amsterdam, "Search and Seizure and Section 2255: A Comment," 420 Pa L Rev 378, 388-389 (1964)	8, 9
--	------

Akhil Reed Amar, <i>The Constitution and Criminal Procedure</i> (Yale University: 1997)	24
--	----

1 Greenleaf, <i>A Treatise on the Law of Evidence</i> (14th ed, 1884)	4
---	---

<i>The Bill of Rights</i> (University Press of Virginia, 1991)	5
--	---

Thomas Davies, "Recovering the Original Fourth Amendment," 98 Mich. L. Rev. 547, fn 25 (1999)	3
--	---

Summary of Argument

The police executed an arrest warrant for a probation violation that was defective because of an error not of their making; the warrant was not even sought by the police. The purpose of the exclusionary rule is to deter police conduct that is improper, in circumstances where it is thought that there is an incontestable compensating gain to the exclusion of truth in a criminal proceeding. Where the police act in accordance with judicial process, and have done nothing improper either in gaining or executing that process, they have done nothing that the law ought to seek to deter. This is the federal rule, and the Michigan Constitution affords no basis for inflicting gratuitous harm on the public where the purpose of exclusion is not served.

Statement of the Question

I.

The exclusionary rule is a judicially created sanction for police misconduct that violates the constitution, designed to deter not to repair. The purpose of the exclusionary rule is not advanced when there is no misconduct by the police. Is exclusion of the truth in a criminal proceeding in the absence of some incontestable compensating gain an affront to justice and inflicts gratuitous harm on the public, so that a good-faith exception should be recognized?

Amicus answers: "YES"

Statement of Facts

Amicus joins the Statement of Facts of the People of the State of Michigan.

Argument

I.

The exclusionary rule is a judicially created sanction for police misconduct that violates the constitution, designed to deter not to repair. The purpose of the exclusionary rule is not advanced when there is no misconduct by the police. Exclusion of the truth in a criminal proceeding in the absence of some incontestable compensating gain is an affront to justice and inflicts gratuitous harm on the public.

A. Introduction

This case is a paradigm of the bankruptcy of unthinking application of the exclusionary rule. Defendant violated his probation after a guilty plea. A probation officer – not a police officer, or any other law-enforcement official – obtained a bench warrant for defendant's arrest on the probation violation, but failed to support the petition for the bench warrant with an affidavit as required by court rule, a deficiency that escaped the notice of the issuing judge.¹ When defendant was arrested on the warrant, a search of his person revealed marijuana, resulting in new charges. Any argument that the police engaged in conduct that ought to be deterred in *any* fashion, much less by the exclusion of probative evidence in a criminal proceeding, is entirely fanciful. And yet the evidence is suppressed.²

¹ MCR 3.606.

² Though not an issue in the case, it seems to amicus that even if the probation violation warrant was technically defective, it nonetheless supplied probable cause, and, unlike searches, there is no "warrant preference" for arrests, and an arrest in a public place need not be based on a warrant, the existence of probable cause being sufficient, so that it is arguable that the arrest and

This is a result that should be intolerable in a criminal-justice system that purports to be rational.³

B. The Exclusionary Rule: Its Purpose and Limits

(1) Purpose

It cannot be gainsaid that *the* purpose of the exclusionary rule is to deter improper police conduct by denying the Government of the *fruit* of that misconduct; exclusion of the evidence is not a remedy to the defendant for a wrong done him or her, nor is a personal right of the defendant. While the Fourth Amendment itself has roots in such cases as *Wilkes v Wood*⁴ and *Entick v Carrington*,⁵ none of these cases resulted in the exclusion of evidence from a criminal proceeding, being rather, for the most part, civil cases to recover damages. Not until almost 100 years after the adoption of the Fourth Amendment did the notion of exclusion of evidence for its violation appear in our jurisprudence, in the case of *Boyd v United States*. Indeed, the contrary of the proposition that evidence should be excluded from trial based on the manner of its acquisition was well-established by the time of the

search incident here were proper despite the defect in the warrant. This question has been not litigated, however, in this case, and amicus will pass over it.

³ See *Brewer v Williams*, 430 US 387, 97 S Ct 1232, 51 L Ed 2d 424 (1977) (Burger, C.J., dissenting).

⁴ *Wilkes v Wood*, 19 Howell's State Trials 1153 (1763).

⁵ *Entick v Carrington*, 19 Howell's State Trials 1029 (1765). Though the more detailed and elaborate statements of Lord Camden's ruling in the case are cited in modern opinions, Professor Thomas Davies has persuasively demonstrated that these statements were unavailable to the Framers. See Thomas Davies, "Recovering the Original Fourth Amendment," 98 Mich L Rev 547, fn 25 (1999).

Boyd decision. Greenleaf⁶ listed among those doctrines of evidence which were "common to all the United States" that:

...though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine the question.

Justice Story, sitting as circuit justice, also rejected an argument that evidence should not be admitted because unlawfully seized, remarking that "...the law deliberates not on the mode, by which (evidence) has come to the possession of the party, but on its value in establishing itself as satisfactory proof."⁷ This opinion, along with that of Justice Wilde of the Supreme Judicial Court of Massachusetts⁸ that

(i)f the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers as evidence, if they were pertinent to the issue....the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question,

were "invoked as authority for like decisions in other state courts" and "relied on by federal courts to justify the admission of books and papers into evidence, regardless of the legality

⁶ 1 Greenleaf, *A Treatise on the Law of Evidence* (14th ed, 1884), § 254a, p.325-326.

⁷ *United States v La Jeune*, 26 F Case 832, 842 (CCD Mass 1822) (No 15,551).

⁸ *Commonwealth v Dana*, 43 Mass 329, 337 (1841).

of their seizure."⁹ Case reports from almost the first 100 years of the existence of the Fourth Amendment reveal a number of actions alleging a wrongful search or seizure, with "traditional common-law forms of action associated with trespass...without exception, the modes of redress invoked."¹⁰ The Fourth Amendment was not ignored; rather, "the requirements of due process and of nonarbitrary searches and seizures lived in harmony in the thought of the Founders. In that same jurisprudence, however, the exclusionary rule has no life at all."¹¹ And then came *Boyd*.¹²

*Boyd*¹³ is of historical interest as the progenitor of the exclusionary rule, but its rationale has been discredited, and it thus does not illuminate the purpose of the exclusionary rule as currently understood. The majority in *Boyd* relied heavily on the *Fifth* Amendment to invalidate an order that Boyd produce an invoice to show the quantity and value of goods alleged to have been illegally imported at a hearing on the forfeiture of those goods, a rationale not followed today. Indeed, 18 years later the Supreme Court in *Adams v New*

⁹ Bradford P. Wilson, "The Fourth Amendment as More Than a Form of Words: The View from the Founding," in Hickok, editor, *The Bill of Rights* (University Press of Virginia, 1991), p.151, 169.

¹⁰ Wilson, at 165.

¹¹ Wilson, at 169.

¹² As Dean Wigmore said, the doctrine that evidence could not be excluded because of the manner of its acquisition "was never doubted until the appearance of the ill-starred majority opinion of *Boyd v United States*...." 4 Wigmore, *Evidence* (2d Ed: 1923) § 2184, p.632.

¹³ *Boyd v United States*, 116 US 616, 6 S Ct 424, 29 L Ed 747 (1886).

*York*¹⁴ rejected a challenge to evidence seized pursuant to a search warrant by simply declaring that courts will not inquire into the means by which evidence otherwise admissible was acquired, distinguishing *Boyd* on its Fifth Amendment rationale by limiting it to situations where a "positive act" of production on the part of the defendant was required.¹⁵

It was *Weeks v United States*¹⁶ which first held that evidence may be excluded on the ground of the method of its seizure, established in the context not of a motion to suppress in the criminal case, but a motion for return of property before trial on the ground that the government had no right to possess it, with the same result reached –the loss of the ability of the government to offer the items as evidence at the criminal trial. Here the rationale for exclusion had no Fifth Amendment basis; rather, said the Court, "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgment of the courts....To sanction(an unlawful invasion of the dwelling) would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution...." In short, the evidence was

¹⁴ *Adams v New York*, 192 US 585, 24 S Ct 372, 48 L Ed 575 (1904).

¹⁵ Today, this situation is treated in some circumstances by a Fifth Amendment right to avoid having mention that the defendant was the one who produced the items, rather than a Fourth Amendment right to avoid producing them. See *United States v Doe*, 465 U.S. 605, 79 L Ed 2d 552, 104 S Ct 1237 (1984); *Couch v United States*, 409 U.S. 322, 327, 93 S Ct 611, 615, 34 L Ed 2d 548 (1973).

¹⁶ *Weeks v United States*, 232 US 383, 34 S Ct 341, 58 L Ed 504 (1914).

excluded to prevent the Government from obtaining an *advantage* through a violation of the Constitution.

Of course, it was *Mapp v Ohio*¹⁷ which applied the rule of *Weeks* to the States by finding the Fourth Amendment "incorporated" by the Fourteenth Amendment, and the exclusion of evidence gained from its violation necessary as a "deterrent safeguard without insistence upon which the Fourth Amendment would" be reduced to a "form of words," the Court also quoting approvingly from *Elkins v United States*¹⁸ that "The rule is calculated to prevent not to repair. Its purpose is to deter...by removing the incentive to disregard it."

It is now clear beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, rather the rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."¹⁹ Most recently the Court in *Pennsylvania Board of Parole v Scott*²⁰ held that the exclusionary rule is not to be applied at parole violation hearings, the Court observing in its analysis that the admission of illegally seized

¹⁷ *Mapp v Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

¹⁸ *Elkins v United States*, 364 US 206, 80 S Ct 1437, 4 L Ed 2d 1669 (1960) (which in federal prosecutions rejected the "silver platter" doctrine where evidence unlawfully seized by state officials, to whom the Fourth Amendment at that time did not apply, could be turned over to federal officials for use in a federal prosecution).

¹⁹ *United States v Calandra*, 414 US 338, 94 S Ct 613, 38 L Ed 2d 561 (1974). See also *Stone v Powell*, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976); *United States v Leon*, 468 US 1032, 104 S Ct 3479, 82 L Ed 2d 778 (1984).

²⁰ *Pennsylvania Board of Parole v Scott*, __US__, 141 L Ed 2d 344 (1998).

evidence does not violate the Constitution; the Fourth Amendment is violated when the illegal search occurs. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures, which has societal costs, meaning that it is not to be applied unthinkingly. Indeed, Chief Justice Warren remarked in *Terry v Ohio*²¹ that:

The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime.

The purpose of the rule, then, is not to repair, but to deter. It carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and is thus not to be applied "unthinkingly." As one commentator has well put it, "Granted that so many criminals must go free to deter the constable from blundering, pursuance of this police of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest."²² What is a "thinking" application of the rule which at least attempts in some measure to avoid the infliction of gratuitous harm on the public?

(2) Limitations on the Exclusionary Rule

That "but for" causation is a *necessary but not sufficient* element of a claim that evidence should be excluded as a result of a constitutional violation by the police is readily

²¹ *Terry v Ohio*, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

²² Amsterdam, "Search and Seizure and Section 2255: A Comment," 420 Pa L Rev 378, 388-389 (1964).

apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation."²³ But the exclusionary rule is not applicable in *all* cases where the evidence at issue would not have been discovered "but for" the improper conduct of the police, despite its deterrent effect in these situations. In some situations, *despite* "but for" causation the rule is not applied because its cost is too high when weighed against its benefits.

(a) Standing

The initial restriction on the application of the exclusionary rule in situations where police error or misconduct is the "but for" cause of the discovery of the evidence to be offered at trial is that of "standing." The Fourth Amendment protection is personal, and though excluding evidence where the Fourth Amendment rights of the individual against whom the evidence is offered were not offended might nonetheless carry with it some deterrent effect, it has long been recognized that the "need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct

²³ 5 LaFave, *Search and Seizure* (3rd Ed.), §11.4, p. 231-232.

would result in imposition of a criminal sanction on the victim of the search."²⁴ The accused simply will not be heard to complain unless it is his or her Fourth Amendment rights that were compromised by the police.

(b) Fruit of the Poisonous Tree and Purged Taint

Though *Nardone v United States*²⁵ is the first case to speak of the causal connection between improper governmental conduct and the evidence allegedly its fruit being so "attenuated" as to "dissipate the taint" of the wrongdoing and allow admission of the evidence, the doctrine came to full flower in *Wong Sun v United States*.²⁶ The Court stated that the test for exclusion is *not* whether but for the improper conduct of the police the evidence would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality...."²⁷ .

Wong Sun teaches that evidence which is discovered as the result of improper police conduct is not necessarily excludable, for the exclusionary rule is not to be applied on a strict "but for" or "cause and effect" basis. The "fruit of the poisonous tree" must be excluded – there must be a "but for" causation demonstrated – but it is not true that all evidence is "fruit

²⁴ *Calandra*, *supra*.

²⁵ *Nardone v United States*, 308 US 338, 60 S Ct 266, 84 L Ed 307 (1939).

²⁶ *Wong Sun v United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

²⁷ *Wong Sun*, at 455.

of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police, the question instead being in each case whether the evidence gained was "come at by *exploitation of the primary illegality*." Where the causal connection is attenuated, or the "taint" somehow "purged," exclusion will not result.²⁸

(c) Inevitable Discovery

*Nix v Williams*²⁹ is a further example of circumstances where though evidence may be discovered as a result of improper police conduct, it will nonetheless not be excluded in order to deter that conduct. The case delineates the nature and scope of the doctrine of "inevitable discovery."

A ten year old girl disappeared from a YMCA building where she had gone with her parents to watch an athletic contest. A warrant was issued for the defendant's arrest, and a large-scale search for the girl undertaken. There was evidence that she had been left somewhere between Des Moines, the place from which she was taken, and a highway rest stop where some of her clothing was found, and it was this area which was being searched by a small army of police and volunteers. In the meantime the defendant surrendered, and ultimately led the police to the body. His confession was found to have been improperly taken in the opinion from the United States Supreme Court commonly known as the "good

²⁸ See also *Johnson v Louisiana*, 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620 (1972); *United States v Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054 (1978).

²⁹ *Nix v Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984).

Christian burial speech" case of *Brewer v Williams*.³⁰ The Court left open whether the body of the girl itself was the fruit of the improperly gained confession, so that the discovery of the body and any evidence gained from its discovery would be inadmissible, the Court expressly noting that this evidence "might well be admissible on the theory that the body would have been discovered in any event...."

On the retrial of Williams evidence from the discovery of the girl's body was admitted, though defendant's confession, and the fact that he had led the police to the body, were not. The state trial judge concluded that the state had proven by a preponderance of the evidence that the search team would have discovered the body within a short time even if Williams had not led the police to it. But on habeas corpus the Eighth Circuit held that inevitable discovery did not apply because it was necessary to demonstrate not only that the evidence would inevitably have been discovered, but also that the constitutional error itself was committed in good faith.³¹ The Supreme Court disagreed with this formulation of the test.

The Court agreed that there is an exception to the exclusionary rule for evidence which would inevitably have been discovered; while, consistent with the deterrent purpose of the exclusionary rule, the police may not place themselves in a *better* position through impermissible conduct, there is no reason, held the Court, to put the police and prosecution

³⁰ *Brewer v Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232 (1977).

³¹ *Williams v Nix*, 700 F2d 1164 (CA 8, 1983).

in a *worse* position than they would have been *had the constitutional violation never occurred*. The good faith or bad faith of the police in the conduct found to be improper is thus irrelevant, for the deterrence rationale is served by placing the police in the *same position they would have been in if no error or misconduct had occurred at all*. *Nix*, at 387. Where the evidence would inevitably have been discovered the evidence is simply considered not the fruit of the illegality--there is no *exploitation* of the illegality, in *Wong Sun* terms--and hence the illegality cannot cause its exclusion. The Court found that the burden of proof on the prosecution to show that the evidence would inevitably have been discovered is the standard of preponderance of the evidence.³²

(d) Independent Source

Closely related to the fruit of the poisonous tree doctrine is the *independent source* doctrine-- where there is improper police conduct, which leads to the discovery of evidence in a "but for" sense, but the same evidence is come at by an *independent* lawful method, there is no reason to exclude it. This is distinguishable from inevitable discovery in that inevitable discovery does not posit an *actual* independent recovery of the evidence, but a *hypothetical* one, which the prosecution must demonstrate *would* have occurred absent the illegality. With the independent source doctrine the evidence is actually obtained by a method independent of the improper one.

³² Michigan has adopted the inevitable discovery rule. See *People v Spencer*, 154 Mich App 6 525 (1986); *People v Kroll*, 179 Mich App 423 (1989).

Illustrative of the doctrine is *Segura v United States*.³³ The defendant was arrested on probable cause in the lobby of his apartment building, and taken to his apartment unit by the police. When his codefendant opened the door the police entered without permission, and during a limited security check of the apartment observed drug paraphernalia. Two agents remained in the apartment while a search warrant was obtained, which for some reason took almost 19 hours. The warrant was executed and three pounds of cocaine, as well as other evidence, was found. The warrant affidavit showed probable cause, and it was based entirely on evidence independent of the observations made during the improper entry into the apartment. In other words, had that entry *never occurred*, the warrant would still have been issued and the search would have taken place, as the warrant affidavit did not rely in any way on the observations in the apartment. The United States Supreme Court held that the properly executed search pursuant to a warrant which was not gained through information obtained in the unlawful entry was an independent source for the discovery of the evidence found in the apartment.³⁴

³³ *Segura v United States*, 468 US 796, 82 L Ed 2d 599, 104 S Ct 3380 (1984). The independent source rule has been followed in Michigan, as demonstrated by *People v Harajli*, 148 Mich App 189 (1986). See also *People v Smith*, 191 Mich App 644, 478 NW2d 741 (1991). The police made a warrantless entry into the defendant's apartment, which they attempted to justify on the grounds of exigent circumstances. The Court of Appeals found the entry impermissible on this basis. But no evidence was seized during this entry; instead, evidence was seized pursuant to the later execution of a search warrant, the affidavit to which established probable cause independent of the prior entry. The court found *Segura* and *Murray* controlling. See also *People v Lewis*, 169 Mich App 255 (1988); *People v Lewis*, 95 Mich App 513 (1980); and *People v Kroll*, 179 Mich App 423 (1989).

³⁴ See also *Murray v United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529 (1988).

(e) Noncriminal Proceedings

Finally, certain proceedings which are not criminal are not subject to the exclusionary rule. As already mentioned, the United States Supreme Court has recently held that the exclusionary rule does not apply to parole revocation proceedings. The exclusionary rule is a judicially created means of deterring illegal searches and seizures which exacts a high cost upon truth-seeking and law enforcement objectives. Particularly because parole is a variation of imprisonment, in itself a restraint on liberty, the State has an overwhelming interest in compliance with terms of parole which is hampered by application of the exclusionary rule. Moreover, parole proceedings are administrative and informal, a process which would be altered by application of the exclusionary rule, requiring what in some cases might be extensive litigation on a collateral matter. The deterrence benefits of the rule simply, said the Court, do not outweigh its costs in this context.³⁵ Thus, though the evidence may be a "but for" result of improper police conduct, it will not be excluded in such a proceeding.³⁶

(3) Conclusion

The purpose of the exclusionary rule is to deter unlawful police conduct by preventing the Government from obtaining any *advantage* from that conduct. This end is accomplished by depriving the Government of the *fruits* improper conduct. Where evidence

³⁵ *Pennsylvania Board of Parole v Scott*, supra.

³⁶ See also *United States v Janis*, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021 (1978) with regard to civil actions.

is discovered which is a "direct" or "primary" result from improper police conduct – a direct effect from a cause – then the evidence will be excluded. The rule of exclusion is not absolute, however, for even where the evidence sought to be admitted is the result of the improper conduct in that but for that conduct it would not have been discovered, the evidence will nonetheless be admissible if 1) the defendant is without standing to complain because it was not his or her right which was violated by the improper police conduct; or 2) if the causal connection between the improper conduct and the discovery of the evidence is so attenuated that it can be said that the "taint" of the improper conduct is dissipated, or, put another way, it can be said that the evidence was not obtained by police "exploitation" of the "primary illegality;" or 3) the Government can demonstrate by a preponderance of the evidence that had the improper conduct which uncovered the evidence not occurred that evidence would have been discovered by lawful means; or 4) the same evidence which was uncovered by the improper conduct is also obtained through a proper independent source; or 5) the proceeding is not one to which the exclusionary rule is to be applied.

C. The Good -Faith Exception to Exclusion

(1) Some Salient United States Supreme Court Cases

The purpose of the exclusionary rule being to deter, not to repair or remedy, it is only logical that its application in circumstances where its purpose is not served inflicts gratuitous harm on the public and on the trial as a truth-seeking adventure. The United States

Supreme Court recognized the point initially some years ago. For example, in *United States v Peltier*³⁷ the Court remarked that:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

The Court concluded that because the law-enforcement officials had relied on then-existing legislative authority, as well as court decisions, in making the "roving" border stop at issue, "nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car" as those rights had been explained in a decision after the search.³⁸

³⁷ *United States v Peltier*, 422 US 531, 539-542, 95 S Ct 2313, 45 L Ed 2d 374 (1975).

³⁸ *Peltier*, at 542.

The good-faith exception was embraced by the Supreme Court in the companion decisions of *United States v Leon*³⁹ and *Massachusetts v Sheppard*.⁴⁰ The facts of the two cases are instructive. In *Leon*, after an extensive investigation the police took their information to a judge, who issued a search warrant for premises. The judicially-authorized searches produced large quantities of drugs and other evidence. The trial judge found the affidavit supporting the warrant insufficient to show probable cause, largely on the basis of a finding that the confidential informant employed in the affidavit had not been established to be credible. In *Sheppard*, a warrant was sought on a Sunday, and the police had a difficult time finding an appropriate application form. Though the warrant was not for controlled substances, the lead detective employed a form for controlled substances search warrants and modified it. But while the subtitle "controlled substance" was deleted from the form, the reference to "controlled substance" in the body of the application itself, that would, when signed, constitute the warrant, was not deleted. A judge examined the warrant application at his home; the detective pointed out his changes he had made, and the judge said he would make necessary changes to provide a proper search warrant. The judge made some changes, but failed to change the substantive portion of the warrant that authorized a search for controlled substances. After the judge returned the warrant to the detective, and informed him that it was sufficient to carry out the search, the search was conducted, and

³⁹ *United States v Leon*, 468 US 897, 104 S Ct 3405, 82 L Ed 2d 677 (1984).

⁴⁰ *Massachusetts v Sheppard*, 468 US 981, 104 S Ct 3424, 82 L Ed 2d 737 (1984).

incriminating evidence found. That evidence, however, was not described in the warrant application, though described in the affidavit, which was not itself a part of the warrant nor made a part by reference.

Leon was decided first; the Court framed the issue as "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause,"⁴¹ answering in the affirmative. The Court's reasoning essentially followed this path:

- The use at trial of fruits of an unlawful search or seizure works no new Fourth Amendment wrong. Whether to employ the exclusionary sanction is an issue separate from the question of whether the Fourth Amendment rights of the person seeking to invoke the rule were violated by police conduct.
- Application of an exclusionary sanction impedes the truth-finding functions of the criminal justice process. When law-enforcement officers have acted in objective good faith, or their errors have been minor, the magnitude of the benefit conferred on guilty defendants offsets basic concepts of justice.
- Indiscriminate application of the exclusionary rule thus may well generate disrespect for the law and the administration of justice, and so its application should be restricted to those circumstances where its deterrent purpose is most efficaciously served.
- The exclusionary rule is not applied on a "but for" basis; exemptions such as dissipation of the taint demonstrate that the

⁴¹ *Leon*, at 900.

exclusionary rule is not applied when its deterrent effect is not worth its cost.

- Reasonable good-faith reliance by law-enforcement officers on other branches of government renders application of a sanction on those officers inappropriate; reliance on statutes or rules not declared unconstitutional at the time of the police action, for example, is appropriate, and exclusion therefore inappropriate to deter that conduct.
- Because the exclusionary rule is designed to deter police misconduct, and not to punish errors of judges and magistrates, application of a sanction to the conduct of the police in taking their information to a neutral and detached magistrate does not serve the purposes of the exclusionary rule, as that conduct is to be encouraged not deterred – at least so long as there is no misconduct in the obtaining of the warrant, such as by deliberate or reckless misstatements in the affidavit.
- When a police officer acting in *objective* good faith has obtained a search warrant from a judge or magistrate and has acted within its scope in the execution of the warrant, there is no police illegality and therefore nothing to deter. Penalizing the police and the public for an error by the magistrate or judge simply cannot contribute to the purpose of the exclusionary rule of deterring unlawful police conduct.⁴²

The Court then applied *Leon* to the facts of *Sheppard*, where there was probable cause for the search, but technical defects in the drafting of the warrant, and an assurance by the issuing judge that the warrant was sufficient as he had modified it. On these facts, the Court found that the belief by the executing officers that the search was entirely proper had an objectively reasonable basis; "an error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police

⁴² *Leon*, at 906-922.

officers, who made the critical mistake."⁴³ Because the police had not acted in a manner that required deterring – had engaged in no insolent or reckless use of authority – exclusion of the evidence was inappropriate.⁴⁴

(2) Michigan Cases

The only "post conflict rule" Court of Appeals decision rejecting the good-faith exception is *People v Hill*,⁴⁵ which the panel in the present case felt bound it as to result, though it would otherwise have established a good-faith exception. The sum and substance of the *Hill* panel's "analysis" was:

Finally, the prosecution contends that this Court should recognize and apply a good-faith exception to the search warrant requirement because the police acted on a search warrant they believed was valid. We decline. *People v. Jackson*, 180 Mich.App. 339, 346, 446 N.W.2d 891 (1989).

What, then, of the *Jackson* decision?

In *Jackson* a search warrant authorized the search of all those present and arriving during the execution of a search warrant for drugs, based on the officer's experience that persons on the premises often attempt to hide the subject of the warrant, and those arriving at these premises often are in possession of the items. The Court of Appeals found this

⁴³ *Sheppard*, at 989.

⁴⁴ And see also *Arizona v Evans*, 514 US 1, 115 S Ct 1185, 131 L Ed 2d 34 (1995), where the error was that of a clerk employed by the court in failing to notify the sheriff's office that an arrest warrant had been quashed; the Supreme Court found evidence discovered incident arrest on that warrant admissible, as the police had acted in objectively reasonable good faith.

⁴⁵ *People v Hill*, 192 Mich App 54 (1991).

insufficient to establish probable cause to search people on or arriving at the premises. To the prosecution's argument for application of a good-faith exception, given that a judge had issued the warrant, the court responded that "our Courts have declined to adopt a good faith exception, *finding greater protection afforded defendant under our own state constitution*."⁴⁶

Do the cases cited by the panel support its contention that the our state constitution supplies a justification for rejecting the good-faith-exception? In *People v Tanis*,⁴⁷ also involving a warranted search, the panel declined the opportunity to adopt a good-faith exception to "the exclusionary rule of the Michigan Constitution," but did not say that anything in the Michigan Constitution required this result. Similarly, in *In re Forfeiture of \$28,088*,⁴⁸ also cited by the *Jackson* court, the panel rejected the prosecutor's argument for a good-faith exception simply because "[s]ince this good-faith exception has not been adopted in Michigan, we do not consider this issue."⁴⁹ None of these cases, then, contains a reasoned analysis that would explain why a different rule than that announced in *Leon* and *Sheppard* should obtain under the Michigan Constitution. In point of fact, there is no basis for a different rule.

⁴⁶ *People v Jackson*, 180 Mich App 339, 346 (1989) (emphasis supplied).

⁴⁷ *People v Tanis*, 153 Mich App 806 (1986).

⁴⁸ *In re Forfeiture of \$28,088*, 172 Mich App 200 (1988).

⁴⁹ *In re Forfeiture*, at 207, fn 1.

(3) The Michigan Constitution affords no basis to reject the good-faith exception

It has frequently been said that Michigan was the first state to “follow the lead” of the United States Supreme Court by voluntarily “imposing on itself an exclusionary rule of evidence.”⁵⁰ This is true as far as it goes, but does it justify a *different* exclusionary rule than the federal, one which refuses to embrace an exception based on good faith? An examination of the progenitor of the rule is helpful to an understanding of the question.

Four years after the decision by the United States Supreme Court in *Weeks*, a party of law-enforcement officers and inspectors of the food and drug department entered the home of August Marxhusen while he was out of the state. The entry was made without probable cause or a warrant, and, this being during the prohibition era, alcoholic liquor that was discovered was seized, and Marxhuasen charged with its possession. The circuit court, however, quashed the information, and ordered that the liquor be returned to Marxhausen. This court reviewed the matter on the prosecutor’s writ of error.⁵¹ It began by quoting the then-existing state constitutional provision on search and seizure:

The person, houses, papers and possession of every person shall be secure from unreasonable searches and seizures. No warrant

⁵⁰ *People v Blessing*, 378 Mich 51, 64 (1966); *People v Smith*, 420 Mich 1, fn 4 (1984) (“Two separate exclusionary rules are applicable in this state: the federal exclusionary rule, and the Michigan exclusionary rule. The former was first announced in *Weeks v United States*.... The latter is the rule developed under Const 1908, art 2, § 10, and first announced in *People v Marxhausen*...”); *Sitz v Department of State Police*, 443 Mich 774, fn 7 (1993) (“In *People v Marxhausen*...this Court became one of the first courts in the country to apply the federal exclusionary rule to exclude unlawfully seized evidence in the courts of our state”).

⁵¹ *People v Marxhausen*, 204 Mich 559 (1919).

to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.⁵²

The court then observed that the provision was "in effect *the same provision found in the Fourth Amendment to the federal Constitution*."⁵³ The court also quoted Michigan's provision against compulsory self-incrimination,⁵⁴ while noting that a like provision was to be found in the Fifth Amendment to the federal Constitution. Other than its initial quotation of the provision, and its observation that it was "in effect" the same as the Fourth Amendment, the Michigan search and seizure provision is *never mentioned again* in the opinion.

The opinion is devoted to a historical understanding of the Fourth Amendment through events in England and colonial America, and a discussion of the *Boyd/Adams / Weeks* trilogy of opinions from the United States Supreme Court. The court concluded that the evidence in the case "conclusively established" the invalidity of the "search and seizure and the invasion of defendant's constitutional rights," so that the circuit court "did not err in directing the return of the liquor to the defendant."⁵⁵ While resort to the Michigan

⁵² 1908 Const, Art. 2, § 10.

⁵³ 204 Mich at 562.

⁵⁴ 1908 Const, Art. 2, § 16 ("No person shall be compelled in any criminal case to be a witness against himself..."). The *Boyd* Court's reliance on self-incrimination principles to support the exclusionary rule is no longer followed anywhere.

⁵⁵ 204 Mich at 574. Whatever the view of exclusion of evidence then or now, an order requiring the *return* of contraband is astonishing, and would not occur today. And see Akhil Reed Amar, *The Constitution and Criminal Procedure* (Yale University: 1997), p. 22.

Constitution was necessary, the Fourth Amendment not yet having been held applicable to the States by the United States Supreme Court, nothing in the opinion suggests that it was doing other than "following the lead" of the United States Supreme Court and adopting an exclusionary rule for improper police conduct just as had that Court. *Marxhausen* not only fails to support a state rule contrary to the federal good-faith exception, but *supports* the following of United States Supreme Court precedent on the point.

Indeed, this court has held repeatedly that, absent a demonstration of compelling circumstances, the history and text of the Michigan search and seizure provision call for application of United States Supreme Court precedent construing the Fourth Amendment. In *People v Nash*,⁵⁶ after a thorough historical analysis, this court concluded that "There is no indication that in readopting the language of Const 1908, art 2, § 10 in Const 1963, Art 1, § 11 the people of this state wished to place restrictions on law enforcement activities greater than those required by the federal constitution. In fact, the contrary intention is expressed."⁵⁷ The court did not state that Article 1, section 11 *must* always be read as consistent with interpretations of the Fourth Amendment, but held that given the history of the provision, and its "plain import," a different reading "should occur only when there is a compelling reason to do so."⁵⁸

⁵⁶ *People v Nash*, 418 Mich 196 (1983).

⁵⁷ 418 Mich at 213.

⁵⁸ 418 Mich at 214.

So also in *People v Smith*.⁵⁹ This court rejected a claim that the doctrine of "automatic standing" should remain as a matter of state constitutional law after its rejection by the United States Supreme Court as a matter of Fourth Amendment interpretation, again noting that there was no "compelling reason" to reach a different result than had the United States Supreme Court, and concluding that "defendant's 'standing' rights under the federal constitution will be the same as those under the Michigan Constitution."⁶⁰ The same point was made by this court in *People v Collins*,⁶¹ and consistently since that time.⁶²

D. Conclusion

The exclusionary rule has no logical force, and inflicts gratuitous harm on the public, when applied to police conduct that it cannot deter—indeed, even should not deter. When the police carry out the command of a judicial officer, that conduct is – or should be – beyond reproach, so long as there is no impropriety in gaining that authority, and the authority is exercised properly. This conduct should be encouraged not "punished," and if magistrates err in determining probable cause, application of an exclusionary "sanction"

⁵⁹ *People v Smith*, 420 Mich 1 (1984).

⁶⁰ 420 Mich at 6, fn 1.

⁶¹ *People v Collins*, 438 Mich 8 (1991).

⁶² See e.g. *People v Perlos*, 436 Mich 305 (1990); *People v Faucett*, 442 Mich 153 (1993); *Sitz, supra*; *People v Champion*, 452 Mich 492 (1996); *People v Stevens*, 460 Mich 626 (1999); *People v Levine*, 461 Mich 172 (1999). While in *Sitz* the court *did* depart from United States Supreme Court precedent, it did so by finding a "compelling reason"; that is, existing precedent construing the state constitution that the majority viewed as at odds with the United States Supreme Court's interpretation of the Fourth Amendment on the point at issue.

scarcely schools them. If higher courts view lower courts as in need of education – and the judiciary, while holding itself to a high standard, should not expect itself to function error-free – then it should put its house in order in some way other than one that impedes determination of the truth in a criminal proceeding. This court should follow *Leon* and *Sheppard*.

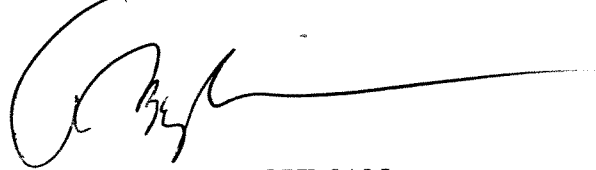
Relief

Wherefore, amicus requests that the Court of Appeals be reversed..

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Timothy A. Baughman', with a long horizontal flourish extending to the right.

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Appendix: Exclusionary Rule Chart

State of mind of officer(s)	Objective facts	Knowledge by officer(s) of facts	Result
No basis to believe search or seizure justified	Objective facts do not justify search or furnish grounds to reasonably believe justified	No facts known that justify seizure	Suppression of any fruits.
No basis to believe search or seizure justified	Objective facts do not justify search or furnish grounds to reasonably belief justified, but demonstrate "purged taint"	No facts known that justify seizure	Fruits not suppressed; exclusion not applied on "but for" basis
No basis to believe search or seizure justified	Objective facts do not justify search or furnish grounds to reasonably believe justified, but demonstrate that fruits would inevitably have been discovered	No facts known that justify seizure	Fruits not suppressed; not causally related to seizure
No basis to believe seizure justified	Objective facts do not justify search or furnish grounds to reasonably believe justified, but demonstrate independent source for fruits	No facts known that justify seizure	Fruits not suppressed; not causally related to seizure
Good faith belief seizure or seizure justified/no judicial process	Objective facts do not justify search but furnish grounds for reasonable belief justified	No facts known that justify seizure	No civil liability; suppression? ⁶³
Good faith belief seizure or seizure justified/ based on judicial process	Objective facts do not justify search, but search order by judge or magistrate	No facts known that justify seizure	No suppression federally; suppression in Michigan
No basis to believe search or seizure justified	Objective facts justify search	Facts justifying search are unknown to officer(s)	Suppression? ⁶⁴

⁶³ Where an officer, even acting without warrant, acts in objective good faith but is mistaken about probable cause, he or she is immune from suit. See e.g. *Paff v Kaltenbach*, 204 F3d 425, 436 (CA 3 ,2000). Amicus submits that in this circumstance the exclusionary rule should not apply; this case does not present this situation.

⁶⁴ Amicus would argue that if objective facts – such as an outstanding arrest warrant – authorize the search or seizure that occurred, exclusion should not occur simply because the

officer has an inappropriate state of mind, just as it is not applied when there is an independent source, or inevitable discovery, or the defendant has no standing, though the officer's state of mind is inappropriate. This case does not present this situation.